Supreme Court, U.S.
FILED
NOV 3 1997
CLERK

No. 96-1469

In The
Supreme Court of the United States
October Term 1997

UNITED STATES OF AMERICA,
Petitioner,

v.

HERNAN RAMIREZ,
Respondent.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

AMICUS CURIAE BRIEF OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS IN SUPPORT OF RESPONDENT

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AMICUS CURIAE BRIEF OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS IN SUPPORT OF RESPONDENT

This brief is filed under S.Ct.Rule 37. Consent to file has been granted by counsel for petitioner and respondent, and the letters were filed with the clerk by them as required by the rule.[1]

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[1] *S.Ct.Rule 37.6 disclosure:* This brief was authored by John Wesley Hall, Jr., a member of the Board of Directors of

INTEREST OF *AMICUS CURIAE*

The National Association of Criminal Defense Lawyers (NACDL) is a private non-profit voluntary bar association of criminal defense lawyers organized under the laws of the District of Columbia. It was organized in 1958. NACDL has about 9,200 direct members, 82 state and local affiliates, and about 30,000 affiliate members. At least 90% of NACDL's membership is comprised of practicing criminal defense lawyers who have intimate knowledge of the criminal justice system.

NACDL's mission, as stated in Art. II, § 1 of its Bylaws is:

> Ensure justice and due process for persons accused of crime
>
> Foster the integrity, independence and expertise of the criminal defense profession
>
> Promote the proper and fair administration of criminal justice

NACDL's objectives and purposes, as stated in Art. II, § 2 of its Bylaws is:

> (a) To promote study and research in the field of criminal defense law and procedure and constitutional law;
>
> . . .
>
> (d) To represent the Association before the legislative, executive and judicial bodies which determine policy for the state and federal governments in a manner that promotes the mission of the Association and its objectives and purposes; and
>
> (e) To preserve, protect and defend the adversary system of justice and the Constitution.

The National Association of Criminal Defense Lawyers believes that continued recognition and adherence to the Bill of Rights by the Judicial, Legislative, and Executive branches of government are necessary to sustain the quality of the American system of justice.

NACDL files at least fifty amicus curiae briefs a year in state and federal appellate courts, including an average of ten per year in this Court. In this regard, NACDL operates through its *Amicus* Committee which decides which cases it will be involved in. All these cases involve application of the Bill of Rights.

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the National Association of Criminal Defense Lawyers (NACDL), *Amicus Curiae*. No other persons authored this brief. Counsel and NACDL made the total monetary contribution to the preparation and submission of this brief without financial support from any source, direct or indirect.

SUMMARY OF ARGUMENT

I. The holding below imposes a higher burden on the government when property is broken to make a "no-knock" entry. That holding is justified by prior cases of this Court.

Protection of the home is a core value of the Fourth Amendment that justifies greater protection in any entry of the home. Also, "the Fourth Amendment protects people; not places." Our understandings as a society are such that greater respect is due the home in this context. Thus, our

societal understanding is that certain areas, like the home, deserve the most scrupulous protection from governmental action.

The common law view is that property should not be broken without great justification. Common law authorities also hold that a greater justification is required when the purpose is to search for a fugitive and not just conduct a search.

The Court's statement last Term in *Richards v. Wisconsin* that reasonable suspicion alone was enough to justify dispensing with announcement is dicta because it cites no binding authority. The cases relied on do not support that holding.

Other cases of this Court, however, such as the administrative search cases, require at least some kind of probable cause for those searches. Therefore, a higher level of justification for a breaking to conduct a "no-knock" entry is required.

II. This type of search involves violence and intimidation. Breaking the glass of an occupied house to make a forcible police entry in the middle of the night is not a *de minimus* intrusion.

It is not disputed that some amount of control of this situation by police is required. It is a fact of life that people will die during these types of raids; police and citizens.

Here, the police turned a window into a "gunport" by jamming an assault rifle through the glass. This was done to intimidate and control the occupants. The officer presumably would have used the weapon against the occupants, and the government also uses stun grenades to disorient occupants. These are not mere *de minimus* breakings into the home under the Fourth Amendment.

ARGUMENT

I.

The Ninth Circuit's rule in this case, which imposes a higher burden on the government to make a "no knock" entry when property is broken, is required by the Fourth Amendment.

A. Protection of the home is a core value of the Fourth Amendment that justifies greater protection from police intrusions

The Fourth Amendment to the U.S. Constitution protects "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." This Court has accordingly repeatedly held that "It is axiomatic that 'physical entry into the home is the chief evil against which the wording of the Fourth Amendment is directed.' " *Welsh v. Wisconsin*, 466 U.S. 740, 748 (1984) (quoting *United States v. United States District Court*, 407 U.S. 297, 313 (1972)); *Payton v. New York*, 445 U.S. 573, 584-85 (1984); *Michigan v. Summers*, 452 U.S. 692, 700 n. 13 (1981); *New York v. Harris*, 495 U.S. 14, 18 (1990); *Maryland v. Buie*, 494 U.S. 325, 341 (1990). In *Payton*, 445 U.S. at 589-90, this Court said:

> But the critical point is that any differences in the intrusiveness of entries to search and entries to arrest are merely ones of degree rather than kind. The two intrusions share this fundamental characteristic: the breach of the entrance to an individual's home. The Fourth Amendment protects the individual's privacy in

a variety of settings. In none is the zone of privacy more clearly defined than when bounded by the unambiguous physical dimensions of an individual's home —a zone that finds its roots in clear and specific constitutional terms: "The right of the people to be secure in their . . . houses . . . shall not be violated." That language unequivocally establishes the proposition that "[a]t the very core [of the Fourth Amendment] stands the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion." *Silverman v. United States,* 365 U.S. 505, 511.

B. "[T]he Fourth Amendment protects people, not places"; our societal understandings

1. Societal understandings and the Fourth Amendment

Our societal understandings control much of the Fourth Amendment's course. Justice Harlan explicated the reasonable expectation of privacy standard in *Katz v. United States,* 389 U.S. 341, 361 (1967) (HARLAN, J., concurring):

> As the Court's opinion states, "the Fourth Amendment protects people, not places." The question, however, is what protection it affords to those people. Generally, as here, the answer to that question requires reference to a "place." My understanding of the rule that has emerged from prior decisions is that there is a twofold requirement, first that a person have exhibited an actual (subjective) expectation of privacy and, second, that the expectation be one that society is

prepared to recognize as "reasonable."

There is a "societal understanding that certain areas [like the home] deserve the most scrupulous protection from governmental action." *Oliver v. United States,* 466 U.S. 170, 178 (1984) (bracketed material added).

The law of standing is governed by the reasonable expectation of privacy standard, and it, too, is premised upon "understandings that are recognized and permitted by society." *Rakas v. Illinois,* 439 U.S. 138, 144 n.12 (1978), also quoting Justice Harlan in *Katz.* Because of these societal understandings, the Court has held that overnight guests have standing to challenge a search of the part of the premises they are staying in. *Minnesota v. Olson,* 495 U.S. 91, 98-99 (1990) ("To hold that an overnight guest has a legitimate expectation of privacy in his host's home merely recognizes the everyday expectations of privacy that we all share. Staying overnight in another's home is a longstanding social custom that serves functions recognized as valuable by society.").

The Court has also looked to societal values in finding that the Fourth Amendment was not violated. *See, e.g., California v. Greenwood,* 486 U.S. 35, 43-44 (1988) (trash search); *Oliver,* 466 U.S. at 182-83 (open fields); *United States v. Jacobsen,* 466 U.S. 109, 122 n. 22 (1984) (field test of drugs).

2. Thus, property interests alone do not control

As already stated from *Katz,* 389 U.S. at 351, "the Fourth Amendment protects people, not places" wherever they have an expectation of privacy. And, "[o]nce this much is acknowledged, and once it is recognized that the Fourth Amendment protects people—and not simply 'areas'

—against unreasonable searches and seizures it becomes clear that the reach of that Amendment cannot turn upon the presence or absence of a physical intrusion into any given enclosure." *Id.* at 353. Property interests do not control; *Warden v. Hayden,* 387 U.S. 294, 304 (1967); and a trespass is not even required to make a Fourth Amendment violation. *Silverman v. United States,* 365 U.S. 505, 511 (1961). "This inquiry necessarily focuses on personal interests in privacy and liberty recognized in a free society." *California v. Ciraolo,* 476 U.S. 207, 220 n. 5 (1986) (POWELL, J., dissenting).

3. There is no distinction for "worthy" or "unworthy" dwellings based on how they are locked

The *amici* states argue that "the time-honored protections served by the Fourth Amendment do not turn on chance or property wealth," and the Ninth Circuit's rule in this area actually promotes class distinctions and in this situation would turn on "haphazard fortuities" and the size of and number of locks on a home. Ohio Br. 12.

This is incorrect. This Court has already held in *Sabbath v. United States,* 391 U.S. 585, 590 (1968), that with regard to 18 U.S.C. § 3109, "[t]he protection afforded by, and the values inherent in, § 3109 must be 'governed by something more that the fortuitous circumstance of an unlocked door.' " The same must be true under the Fourth Amendment.

In addition, the Fourth Amendment does not recognize any distinction between "worthy" and "unworthy" containers; *United States v. Ross,* 456 U.S. 798, 822 (1982); or vehicles; *California v. Carney,* 471 U.S. 386, 394 (1985). *See Florida v. Jimeno,* 500 U.S. 248, 254 (1991) (recognizing rule); *United States v. Jacobsen,* 466 U.S. 109, 129 (1984) (recognizing rule).

A fortiori, there can be no "worthier home" rule, either.

C. The common law view that property should not be broken without great justification

In *Wilson v. Arkansas,* 514 U.S. 927 (1995), this Court held that the knock-and-announce requirement of the common law was a part of the Fourth Amendment. The Court relied on and quoted *Semayne's Case,* 5 Co.Rep. 91a, 91b, 77 Eng.Rep. 194, 195-96 (K.B.1603), which, in turn, relied upon a statute from 1275 which was part of the common law:

> But before he breaks it, he ought to signify the cause of his coming, and to make request to open doors . . . , for the law without a default in the owner abhors the destruction or breaking of any house (which is for the habitation and safety of man) by which great damage and inconvenience might ensue to the party, when no default is in him; for perhaps he did not know of the process, of which, if he had notice, it is to be presumed that he would obey it.

Id. at 931.

As for searches of the premises, MATTHEW HALE, PLEAS OF THE CROWN 116-17 (1687; 1st American edition, 1847), requires "strong necessity and notice," and he also wrote about entries into the premises of third parties to search for wanted persons:

> If a justice of the peace issues a warrant to appre-

hend a felon, who is in his own house, and after notice of the warrant and request to open the door it is refused or neglected to be done, the officer may break open the door to take him [20] and the same law is, if it be but for suspicion of felony. 13 *E.* 4. 9. a. 5 *Co. Rep.* 91. *b. Semain's* case.(*)

> [20] But only upon strong necessity and after notice. *Curtis'* case, *Foster,* 135; 2 *Hawk. ch.* 14, 1; *Lannock v. Brown,* 2 *B. & Ald.* 592. See *Burdett v. Abbott,* 14 *East.* 163; *State v. Smith,* 1 *N. Hamp.* 346; *Bell v. Clap,* 10 *Johnson,* 263; *State v. Shaw,* 1 *Root,* 134; *Kelsey v. Wright,* 1 *Root,* 83.
>
> (*) *Part* I, *p.* 572.

And so much more may he break open the house of another person to take him, for so the sheriff may do upon a civil process. 5 *Co. Rep.* 93. *a. Semain's* case. But then he must at his peril see that the felon be there, for if the felon be not there, he is a trespasser to the stranger whose house it is; but in both cases the officer must first notify his business that he comes about, and demand admission. *Ibidem.* . . .

> If a warrant of the peace issue from a justice of the peace, the officer or minister of such warrant may break open a door in case of a refusal to open after demand of notice of his business ruled by *Popham* and *Clerk,* 3 *Jac. Dalt. cap.* 78, *p.* 204, 205.

Similarly, 2 WILLIAM HAWKINS, A TREATISE ON PLEAS OF THE CROWN ch. 14, § 1, at 86-87 (1721), stated the rule as "no one can justify the breaking open of another's Doors to make an Arrest, unless he first signify to those in the House the Cause of his coming, and requests them to give him Admittance."

Last Term, the Court further explained in *Richards v. Wisconsin,* 117 S.Ct. 1416, 1421 n. 5 (1997), that

> the individual interests implicated by an unannounced, forcible entry should not be unduly minimized. As we observed in *Wilson v. Arkansas,* 514 U.S. 927, 930-932, 115 S.Ct. 1914, — - —, 131 L.Ed.2d 976 (1995), the common law recognized that individuals should have an opportunity to themselves comply with the law and to avoid the destruction of property occasioned by a forcible entry. These interests are not inconsequential.

D. Greater intrusion equals greater justification in other areas of the Fourth Amendment

The greater the intrusion under the totality of the circumstances, the greater the justification required by the Fourth Amendment. Government necessity, while important, does not equal absolute power over citizens.

In the area of stop and frisk under *Terry v. Ohio,* 392 U.S. 1, 26 (1968), the justification for the limited pat down is looking only for weapons. This need to look for weapons was balanced with the fact that the pat down was less intrusive than a full search.

In "hot pursuit," *Dorman v. United States,* 140 U.S. App.D.C. 313, 475 F.2d 385, 394-95 (1970), the District of Columbia Circuit adopted the rule in unconsented warrantless entries that the greater the intrusion, the greater the justification that is required for it. The peacefulness of the entry also was a factor in a finding of reasonableness for the entry based on exigent circumstances. In any event, a grave crime was required. The *Dorman* formulation was relied upon in *Payton,* 445 U.S. at 587, and other cases.

The nature of the intrusion, coupled with the government's showing and need for it, sometimes leads to the result that the intrusion is unreasonable.

For example, in *Welsh v. Wisconsin, supra,* 466 U.S. 740, this Court held that the nature of the offense there (suspected DWI) did not justify a warrantless entry to arrest, even though evidence of the crime, the suspected drivers' blood alcohol level, would dissipate immediately and prompt action would be required to get necessary evidence.

Similarly, the Court held in *Schmerber v. California,* 384 U.S. 757 (1966), that for the government to pierce the skin, draw blood, and subject it to analytical and scientific testing, it must show that there is a clear indication that evidence will be found. "The interests in human dignity and privacy which the Fourth Amendment protects forbid any such intrusions on the mere chance that desired evidence might be obtained"; a clear indication it would be found was required. *Id.* at 769-70.

After *Welsh,* the Court held in *Winston v. Lee,* 470 U.S. 753, 765-66 (1985), that a search for a bullet in a suspect's body by surgery under general anesthetic was unreasonable because of the serious nature of the invasion, considering the alternatives available to the government. The crime was serious, but so was the surgery. Ultimately, the government could prove its case another way. Thus, that search was unreasonable.

Here, the court below was correct in requiring a greater justification for imposing a gun into the premises. The officers had an obvious alternative: They did not need to make a forcible entry in the middle of the night. They could have waited Shelby out or tricked him to get him to come out. In either regard, he would not have been hidden in somebody else's house. Of course, he was not in the

house anyway because the government's surveillance was weak at best that the person they believed was inside was Shelby.

E. *Richards'* comment about reasonable suspicion alone being enough to justify dispensing with announcement is dicta and cites no binding authority

In *Richards v. Wisconsin, supra,* at 1421-22, this Court stated in what is virtually dicta that,

> to justify a "no-knock" entry, the police must have a reasonable suspicion that knocking and announcing their presence, under the particular circumstances, would be dangerous or futile, or that it would inhibit the effective investigation of the crime by, for example, allowing the destruction of evidence. This standard—as opposed to a probable cause requirement—strikes the appropriate balance between the legitimate law enforcement concerns at issue in the execution of search warrants and the individual privacy interests affected by no-knock entries. Cf. *Maryland v. Buie,* 494 U.S. 325, 337, 110 S.Ct. 1093, 1099-1100, 108 L.Ed.2d 276 (1990) (allowing a protective sweep of a house during an arrest where the officers have "a reasonable belief based on specific and articulable facts that the area to be swept harbors an individual posing a danger to those on the arrest scene"); *Terry v. Ohio,* 392 U.S. 1, 30, 88 S.Ct. 1868, 1884-85, 20 L.Ed.2d 889 (1968) (requiring a reasonable and articulable suspicion of danger to justify a pat-down search). This showing is not high, but the police should be required to make it whenever the reasonableness of a no-knock entry is challenged.

We submit that the constitutional foundation for this statement is lacking. The authorities for it are cited with a mere "Cf." for "compare." The reasonable suspicion standard as governing the nature of a violent entry of a home appeared full blossom from cases not in point, and these cases should not have been stretched to that extreme. While serious in themselves, a protective sweep *after* an entry[2] and a stop and frisk are, by definition, considerably less serious intrusions when compared to a "no-knock" entry which is truly a major event. As stated above, it is fraught with danger for everyone involved and is terrorizing for the citizens whose rights have been subordinated to the government's interest in entering under a warrant in the first place.

F. The Ninth Circuit's rule requiring a greater need for a breaking is justified by prior cases of this Court

A higher standard than reasonable suspicion is required by the Fourth Amendment. For example, in *Camara v. Municipal Court,* 387 U.S. 523, 538-39 (1967), the Court held that administrative probable cause was required to constrain government discretion in entering the home; it is not probable cause in the criminal justice sense, but it is still probable cause. *Accord: Marshall v. Barlow's, Inc.,* 436 U.S. 307, 320-21 (1978); *Donovan v. Dewey,* 452

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[2] We concede that the point of a protective sweep is to protect against an attack on an officer. *Buie,* 494 U.S. at 333. Our point is that a sweep is a walk-through, likely even with a gun at the ready, but it does not involve battering rams and stun grenades wielded by 45-man SWAT teams.

U.S. 594, 599 (1981). Similarly, the Court has permitted warrants for entry into fire-damaged premises without a traditional showing of probable cause in the criminal sense, but it still requires some showing of cause to eliminate arbitrariness. *Michigan v. Clifford,* 464 U.S. 287, 294 (1984). The Court has also required prior authorization on less than criminal probable cause for roving patrols on interstate highways near the border. *Almeida-Sanchez v. United States,* 413 U.S. 266, 279-85 (1973).

All these cases involve a higher standard of probable cause than reasonable suspicion. The common law required a greater justification for entries involving breakings, and the Fourth Amendment has always been held to entitle the home to higher protection from governmental intrusion. Therefore, a higher level of justification for a breaking to conduct a "no-knock" entry is required.

II.

Breaking glass of an occupied house to make a forcible police entry in the middle of the night is not a *de minimus* intrusion, constitutional or otherwise.

A. What law enforcement tells us about why they need to do it

The government and its *amici* argue that there is often great risk to officers from executing search warrants. To some extent this is true, but their position overstates both the risks and the numbers, and they do not mention the risks to citizens. It is a regrettable fact of life that people are going to die during "no-knock" raids; both police and citizens. The Fourth Amendment is designed to protect all "the people," not just the police.

As the government argues:

> To minimize those dangers, officers sometimes break a window to distract the occupants and thereby increase the officers' ability to gain quick control of the situation. By drawing the occupants' attention to the sound of breaking glass, officers may be able to divert the occupants into the less threatening positions, gain control of their movements, and reduce the risk of violence. Cf. *Michigan v. Summers,* 452 U.S. 692, 702-703 (1981) ("The risk of harm to both the police and the occupants is minimized if the officers routinely exercise unquestioned command of the situation.").

Gov.Br. 21. A book has been written on the subject. CHARLES REMSBERG, THE TACTICAL EDGE: SURVIVING HIGH RISK PATROL (1986).[3]

While all concede there must be the ability for officers to assert control, it is not without legal or social limits.

B. Reality of raids

1. Raids are intended to be quite violent and intimidating in the extreme, even when no one gets hurt

Amicus submits that reality must also be considered, and, if *amicus'* membership's experience is any guide, reality is more like *Larez v. City of Los Angeles,* 946 F.2d 630, 634-35 (9th Cir.1991), where the officers in a raid profanely threatened the citizens with violence, slammed them to the floor, and put guns in their face,[4] and *Rivera v. United States,* 728 F.Supp. 250, 255 (S.D.N.Y.1990), where the DEA was executing a search warrant for drugs on an informant's tip on three nearby apartments, officers beat down the doors with battering rams allegedly without warning, threatened the occupants at gunpoint, strip searched a woman, and found nothing. For obvious reasons, these types of cases do not end up on "COPS" for everyone to see.

Also, the government wants to give carte blanche to officers in this situation because it believes that the officer on the scene is the best judge of what should happen. Not always so. It is recognized that officers in these situations have their adrenaline pumping hard, and this creates high stress; they may more readily shoot accidentally or prematurely, their eyes may play tricks on them, their eye-hand coordination will suffer, and their judgment will be impaired. REMSBERG, *supra,* at 22-24.[5] Yet, this is where the

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[3] This subject is also discussed to a lesser extent in Donald B. Allegro, *Police Tactics, Drug Trafficking, and Gang Violence: Why the No-Knock Warrant Is An Idea Whose Time Has Come,* 64 NOTRE DAME L. REV. 552 (1989), relied on in *State v. Richards,* 201 Wis.2d 839, 850, 549 N.W.2d 218, 223 (1996), *rev'd,* 117 S.Ct. 1416 (1997).

[4] The reported cases are the tip of the iceberg. Virtually every criminal defense lawyer regularly hears clients tell of similar abuse at the hands of officers.

[5] *See, e.g., United States v. Slater,* 971 F.2d 626, 636 (10th Cir.1992); *Stroick v. Ponsetti,* 683 So.2d 1342, 1349 (La.App.4th Cir.1996); *Avila v. State,* 1997 Tex.App.Lexis 4782, *19-*20 (Aug. 28, 1997). In *State v. Albrecht,* 97 Md.

government notes that the Court has previously noted that they "are often forced to make split-second judgments . . . about the amount of force that is necessary in a particular situation." *Graham v. Connor,* 490 U.S. 386, 397 (1989), quoted in Gov.Br. 17.

It must be remembered that the raid is being conducted by "officer[s] engaged in the often competitive enterprise of ferreting out crime"; *Johnson v. United States,* 333 U.S. 10, 14 (1948); "acting under the excitement that attends the capture of persons accused of crime." *United States v. Lefkowitz,* 285 U.S. 452, 464 (1932). Also, citizens often respond with force not knowing who is coming in. *See, e.g., McDonald v. United States,* quoted *infra.*

The government's argument virtually "end runs" the prohibition against blanket exceptions to the rule of announcement forbidden in *Richards,* and it serves to elevate "no-knock" beyond judicial review contrary to *Ornelas v. United States,* 116 S.Ct. 1657 (1996).

2. Statistics of officer deaths

The *amici* states advise that the *Uniform Crime Reports, Law Enforcement Officers Killed and Assaulted*

App. 630, 632 A.2d 163 (1993), *rev'd,* 336 Md. 475, 649 A.2d 336 (1994), a police officer was convicted in a nonjury trial of involuntary manslaughter and reckless endangerment for shooting an unarmed suspect in the chest with a shotgun. (He also frisked her before CPR could be performed.) The Maryland Court of Special Appeals reversed the conviction because the stress of the moment removed the gross negligence from the shooting, but the Maryland Court of Appeals reversed and affirmed the conviction.

("UCR") show high numbers of officer deaths in "drug-related matters." (The Wisconsin court in *Richards,* 201 Wis.2d at 853-55 nn. 8-10, 549 N.W.2d at 223-25 nn. 8-10, did the same thing.) For example, the 1994 UCR report showed that 53 of 708 officer deaths were drug related. The *amici* states admit that there is no way to tell how many are related to drug raids. Ohio Br. 10.

Agreed, the number of officers killed in drug raids is not readily apparent. The tables in the UCRs only indicate where to look. The tables only show the number of officers killed each year in "drug related matters," but they are overinclusive. The summaries of killings in each of the UCRs must be consulted for an accurate view.

The petitioner's brief in *Richards*, 1997 WL 65852, in its Appendix A, analyzed the 1981-94 UCRs, and it showed that the overwhelming majority of felonious deaths of police officers were unrelated to the execution of search warrants in drug cases. There is no significant statistical correlation between announcement or lack of announcement in a drug raid and the resulting deaths. Only 8 of 23 summaries even mention whether announcement occurred. The circumstances of some killings show that the officer was shot on entry, but the greatest threat to officers was from being shot by assailants hidden inside and not from being shot on entry. The summaries seldom tell whether announcement was an issue.[6]

C. Risk to citizens

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[6] For what it is worth, an officer is substantially more likely to be shot during a traffic stop than in a drug raid. *Compare Maryland v. Wilson,* 117 S.Ct. 882, 885 (1997).

The government implicitly recognizes the risk to citizens by the "Cf." reference to *Summers;* Gov.Br. 21, *supra;* but it does not discuss it. *Amici* do not even mention the risk to citizens because their interest is upholding or supporting law enforcement. The UCRs, of course, do not have a table concerning deaths of citizens at the hands of police officers. To determine the number of citizen deaths requires painstaking review of case law, newspaper articles, and books.

The risk to citizens from any violent raid is no small matter. And, one of the points of having a knock-and-announce rule is that it gives the occupants and the police one last opportunity to determine whether they have the right place. *Ker v. California,* 374 U.S. 23, 57-58 (1963) (BRENNAN, J., concurring). It also gives the householder the opportunity to surrender his or her privacy to the processes of the law without force or violence. *Id.*

Armed and unarmed citizens are shot and killed by law enforcement officers executing warrants all the time. Sometimes the police search the wrong place. Oftentimes the citizen does not fully appreciate that law enforcement officers are breaking in and are not burglars.[7] To some

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[7] This was the factual issue tried in case pending before the Arkansas Supreme Court. *Green v. State,* CR97-59 (Ark. (submitted Oct. 16, 1997)). Green was convicted of murder in the shooting death of a law enforcement officer during a drug raid for a small amount of cocaine. Officers admitted at his trial that they knew going in that, one month earlier, Green had been one victim of a rash of home invasion robberies where the robbers at the door claimed to be police. Two weeks earlier, the police urged citizens in the newspaper to shoot anyone coming in who did not properly identify themselves. At trial, the officers said they announced; Green and his girlfriend testi-

extent, at least, it is apparent that the Fourth Amendment helps protect police from their own mistakes or overzealousness. A half century ago, Justice Jackson, concurring in *McDonald v. United States,* 335 U.S. 451, 460-61 (1948), noted the great risk of violence in unannounced police entries:

> I am the less reluctant to reach this conclusion because the method of enforcing the law exemplified by this search is one that is certain to involve the police in grave troubles if continued. That it did not do so on this occasion was due to luck more than to foresight. Many homeowners in this crime beset city doubtless are armed. When a woman sees a strange man, in plain clothes, prying up her bedroom window and climbing in, her natural impulse would be to shoot. A plea of justifiable homicide might result awkwardly for enforcement officers. But an officer seeing a gun being drawn on him might shoot first. Under circumstances of this case, I should not want the task of convincing a jury that it was not murder. I have no reluctance in condemning as unconstitutional a method of law enforcement so reckless and so fraught with danger and discredit to law enforcement agencies themselves.

Congress adopted a no-knock warrant procedure for drug cases in 1970. Comprehensive Drug Abuse, Prevention, and Control Act of 1970, § 509(b), Pub.L. No. 91-513, 84 Stat. 1236, 1274 (1970). (*See* H.R.Rep. No. 907, 91st Cong., 2d Sess. 202 (1970), reprinted in 1970

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fied they did not hear it.

U.S.C.C. & A.N. 4653-57 (stating the view opposed to adoption)). *See* Note, *Unannounced Entry to Search: The Law and the "No-Knock" Bill (S. 3246)*, 1970 WASH.U.L. Q. 205.

The horror stories of abuse of citizens under that "no-knock" regime, however, led to its repeal just four years later. Between 1970 and 1974, over 100 newspaper articles were published about "no-knock" horror stories. They were inserted into the Congressional Record to demonstrate the sordid abuses of no-knock warrant execution: While defending their homes, innocent householders shot and killed police officers and police officers shot and killed innocent householders, some of whom were doing virtually nothing and posing no threat to anyone. The Congressional Record references are cited in Note, *The Knock and Announce Rule: A New Approach to the Destruction of Evidence Exception*, 93 COLUM.L.REV. 685, 705 n. 133 (1993); JAMES BOVARD, LOST RIGHTS 234-39 (1994). Congress thus repealed it. Appropriations—Controlled Substances Act of 1974, Pub.L. No. 93-481, § 4, 88 Stat. 1455, 1456 (1974).

Even though the "no-knock" provision was repealed, "no-knock" entries and deaths still occur. We submit that the empirical evidence indicates that citizens are at least as likely to die as police during raids:

The wrong places are raided all the time. "It happens every day in this business." Joe Hallinan, "Drug Wars: Fervor Often Injures the Innocent," *New Orleans (LA) Times-Picayune* (Sept. 26, 1993) A20. For example, Rev. Accelyne Williams, a 75 year old black minister, was the subject of a mistaken drug raid. After breaking down his door, the police chased him through his house to his bedroom, handcuffed him, and this provoked a heart attack which killed him. The police obtained a "no-knock" war-

rant because their informant told them they could expect armed resistance. His widow settled with the Boston Police Department for $1,000,000. "Boston Police 'sorry' for fatal mistake," *Boston Glove* (March 27, 1994) 1994 WL 5358435; "Boston to Give Victim's Widow $1 Million in Wrongful Death Suit," *N.Y. Times Abstracts* (Apr. 25, 1996) 1996 WL 7503359; "Boston Settles Death Suit," *Nat'l L.J.* (May 6, 1996) A8.

Other examples of violent raids of the wrong place appear in: Andrew H. Malcolm, "Violent Drug Raids Against the Innocent Found Widespread," *N.Y. Times* (June 25, 1973) A1; "Fatal Shooting by Police Questioned in Drug Raid / Critics say they have too much power," *San Francisco Chronicle* (Nov. 2, 1992), 1992 WL 6287829 (killing of Don Scott in drug raid for nonexistent marijuana patch); "Anatomy of a Shooting / 8-year-old dies after gun battle during drug raid / Officer thinks he may have killed boy," *Atlanta Journal and Constitution* (Nov. 14, 1991), 1991 WL 7835413; "Apologies 'Don't Help' for Cops' Drug Raid Error," *San Francisco Chronicle* (Dec. 2, 1992), 1992 WL 6292803; "Federal Agents Raid Wrong Guthrie Home / Resident Tells of Forced Entry," *Saturday Oklahoman* (Dec. 21, 1991), 1991 WL 6139607. *See also* "The night they raided the wrong Janice," *Portland Oregonian* (Mar. 7, 1993), 1993 WL 6890184 (no shooting).

Shooting cases include: "Drug-raid shooting victim wins $225,000 settlement," *Denver Post* (April 6, 1996), 1996 WL 6689450 (no-knock raid led to shooting of occupant; the person wanted had already been arrested); "'No-knock' raid triggers anger / Couple claims they were innocent victims," *Evansville Courier* (Dec. 19, 1994), 1994 WL 9834885; "We were just a family watching TV," *St. Petersburg Times* (July 23, 1994), 1994 WL 4787388; "Lawsuit seeks $100,000 in damages," *Harrisburg Patriot*

(Mar. 13, 1992), 1992 WL 8738942 (warrant had expired); "Deadly Force / Policeman's Fatal Shot Will Haunt Him Forever / Officer in Lavoie Case Faces Probes, Trauma," *New Hampshire Week* (Oct. 8, 1989), 1989 WL 4831205 (*see also* "N.H. Judge Blasts Police Search, Throws Out Evidence in Drug Case," *Boston Globe* (July 31, 1990), 1990 WL 5831041); "Family Sues City Over Fatal Shooting / Officer Believed TV Control was Weapon," *Seattle Post-Intelligencer* (Nov. 7, 1995), 1995 WL 4328046 (*see also* "Seattle Police Cleared in Raid that Killed Man," *Seattle Times* (Nov. 16, 1995), 1995 WL 11223096 (jury found no liability)); "They Shot Daddy," *Isthmus* (Madison, WI) (June 30, 1995); "Fatal Shootout, Fire in Drug Raid / San Jose officer seriously injured in 1-hour gun battle," *San Francisco Chronicle* (Mar. 20, 1991), 1991 WL 4180041; "Lawyer Killed, Officer Hurt in Raid on Alleged Cocaine Ring," *Los Angeles Times* (Feb. 27, 1987), 1987 WL 2208330; "Suspect Killed, Officer Wounded in Shoot-Out," *Los Angeles Times* (Mar. 22, 1985), 1985 WL 2200366; "Excesses blamed in 'bad' raids," *San Diego Union-Tribune* (Dec. 13, 1992), 1992 WL 4766590 (raid on bogus informant tip led to shooting of innocent landowner).

D. Common law view of forced entries

By the Sixteenth Century, English searches and seizures had become a means of controlling and intimidating the populace.

Prior to about 1580, searches were limited to the lower classes and vagrants, so the rest of the population did not care or hear about it. WILLIAM J. CUDDIHY, THE FOURTH AMENDMENT: ORIGINS AND ORIGINAL MEANING, 602-1791, 198 (doctoral dissertation, Claremont (Cal.)

College, 1990). By then, searches became increasingly intense and violent and more people had to endure them.

> Protestants, Catholics, yeoman, squires, noblemen, and Englishmen of every description encountered the kinds of searches that only vagrants and a few others had experienced previously. . . . [T]he new searches were being executed with unaccustomed intimidation, terror, and force. In fact, violent, general searches emerged gradually upon the English people after 1485, but in the 1580s and 1590s, they must have seemed to be exploding into the public consciousness from out of nowhere. That sensation was the foundation for the nascent right against unreasonable search and seizure.

Id. at 189-90.

One passage from CUDDIHY describing Sixteenth Century searches could describe searches and raids in the 1990s:

> "hot" ministers of the Protestants and emissaries of the Crown were often sent long on these expeditions to insure that they were conducted with sufficient thoroughness and violence. . . . The search itself was a quasi-military exercise, designed to intimate whoever experienced it. Each house was scouted before hand, spies positioned before every door and window, and guards set to prevent escape. Then the queen's men entered with swords drawn, crossbow bent, and pistols cocked, sparing not even the sick in their beds from intrusion.
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> . . . Those who were the objects of such official attention, he observed elsewhere "carry their lives always in their hands," for a mere knock at the door

was enough to silence their dinner conversation, arrest their attention like deer at the sound of approaching hunters, and lead everyone present to commend himself to God.

Id. at 152-53.

It was against this background that *Semayne's Case* was decided just a few years later.

E. There can be no *de minimus* breaking into the sanctity of the home; especially when it is with a semi-automatic rifle

1. A breaking is a breaking

The government and its *amici* argue that breaking a window is not a significant occurrence. In one sense, it is not. What does a window cost? But that misses the entire constitutional argument. In a larger sense, it is highly significant because officers have broken past the "bound[s of] the unambiguous physical dimensions of an individual's home." *Payton,* 445 U.S. at 589-90 (bracketed material added). Just as "a search is a search" in the constitutional sense; *Arizona v. Hicks,* 480 U.S. 321, 325 (1987); a breaking is a breaking. *Karo v. United States,* 468 U.S. 705, 717 (1984) (monitoring a beeper once in the home requires a warrant; not "a minuscule intrusion on protected privacy interests").

2. Breaking a window to enter is an act of violence, aggression, and intimidation against the occupants

The breaking of a window in the night is not a *de*

minimus act. Rather, it is an act of violence, aggression, and intimidation. It is designed to evoke terror in the occupants as a part of the government's assertion of control. People are scared to death when they think they are being burglarized at night.[8]

"We are at our most vulnerable when we are asleep because we cannot monitor our own safety or the security of our belongings." *Minnesota v. Olson,* 495 U.S. 91, 99 (1990). That is precisely why the law universally treats unlawful entry into an occupied dwelling as a violent crime that the homeowner may lawfully resist with deadly force. *See, e.g.,* MODEL PENAL CODE §§ 3.04(2)(b), 3.06(3)(d), 3.07(5) (Official Draft 1962; 1985 ed.) & *Commentary* at 91 (follows common law); RESTATEMENT (SECOND) TORTS § 79, Comment *b*, illustrations 1-2; Ark. Code Ann. § 5-2-620 (presumption force was lawful); Cal. Penal Code § 198.5 ("Homeowner's Bill of Rights"); 21 Okl.Stat.Ann. § 1289.25 ("May My Day" law; reasonable belief of occupant a defense). The homeowner literally can shoot first and ask questions later because he does not have to "await

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[8] *See, e.g., State v. Sutton,* 220 Neb. 128, 130-31, 368 N.W.2d 492, 494-95 (1985) (victim of burglary heard coins dropping on table; she went to investigate and encountered a burglar within two feet of her; she ran screaming from the house and suffered "fear [that] continued for several days after the robbery."); *Commonwealth v. Stepp,* 438 Pa. Super. 499, 504, 652 A.2d 922, 924 (1995) (a potentially violent encounter exists whenever a person discovers an intruder inside his home); *Sabri v. State Farm Fire & Casualty Co.,* 488 So.2d 362 (La.App.3d Cir. 1986) (father heard noise at door as key was working the lock; he came downstairs and shot his grown daughter as she came through the door; she was fleeing her home and her abusive husband and did not call ahead).

the glint of steel before he can act to protect his safety." *See People v. Benjamin,* 51 N.Y.2d 267, 271, 434 N.Y.S.2d 144, 147, 414 N.E.2d 645, 648 (1980).

In the context of a police search for a suspect in the home of a third person, however, different considerations must apply. A fugitive knows that he is a fugitive, and he is on the run. He certainly fears the knock at the door where an innocent householder does not because the fugitive may believe that it may be police. When the fugitive is in the home of a third person, however, the third person may not know that the guest is a fugitive, and this householder would have no expectation or fear that the police would be coming. Thus, the householder might more logically respond with force. This is why the Court requires a search warrant rather than an arrest warrant when the suspect is in the home of another. *Steagald v. United States,* 451 U.S. 204, 212 (1981); *Payton v. New York, supra.*

3. Aiming semi-automatic weapons in the house is not a minor entry

Aside from all the above, we add to the calculus here that an officer stuck a gun barrel ("gunporting") through the window. For what purpose does anyone aim a gun? To threaten, intimidate, and control, of course. (*See United States v. Latimer,* 415 F.2d 1365 (6th Cir.1969) (pointing semi-automatic pistol at FBI agent is an assault under 18 U.S.C. § 111).) It cannot be contended by anyone that aiming a loaded AR-15 assault rifle with a forty round clip at a person who is in his own house is not a serious constitutional event.

Consider an analogy: If a "stop and frisk" is not a "petty indignity," but is considered "a serious intrusion upon the sanctity of the person, which may inflict great

indignity and arouse strong resentment, and it is not to be undertaken lightly"; *Terry v. Ohio,* 392 U.S. 1, 17 (1968); then sticking a gun through a window in an apparent effort to either terrorize or deter those who see it or use it to shoot an occupant is hardly a *de minimus* occurrence either.

4. Throwing in stun grenades is not a minor entry either

The Government mentions that its rule would also permit officers to use "stun grenades" or "flash bang" devices, "which are designed precisely to reduce the threat of violence to officers, inhabitants, and the public," even though their use "often require[s] minor property damage such as the breaking of a window." Gov.Br. 22.

This is no minor occurrence either.

Filled with 1 to 3 ounces of flash powder, this hand grenade simulator explodes after a 1 to 1.5-second delay with a boom that may literally be deafening, a brilliant white-out of light that may cause at least temporary blindness, and a staggering concussion desired to jar and disorient anyone in its vicinity. (Some flash bang models emit a shrill whistle just before exploding to make the barricader look in their direction so he gets the full dazzling/dazing effect of the blast. Some also throw out rubber projectiles to sting anyone nearby.)

Used properly, the flash bang can forestall meaningful resistance and give you time to get through the fatal funnel and cover considerable ground inside safely. . . . But it can have drawbacks. For instance, smoke from one grenade can easily fill a 12 x 12-foot

room and will seriously hamper visibility. Fire-setting is a possibility.[9]

REMSBERG, *supra,* at 233-34. Yes, a window may be broken when this "destructive device"[10] comes into the property to be searched, but anything that is capable of burning down the house and, according to ATF, qualifies as a prohibited "destructive device" under the criminal law is hardly only going to inflict "minor property damage" as the government suggests.

CONCLUSION

The holding below is founded on constitutional ground, and it should be affirmed.

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[9] They can also blow holes in walls. "'No-knock' raid triggers anger / Couple claim they were innocent victims," *Evansville Courier, supra.*

[10] A stun grenade is a "destructive device" under 18 U.S.C. § 921(a)(4). *United States v. Markley,* 567 F.2d 523, 526 (1st Cir.1977), *cert.denied,* 435 U.S. 951 (1978); *United States v. Ruiz,* 73 F.3d 949, 952-53 (9th Cir.1996) (it is a tactical weapon capable of destroying property by fire and incapacitating people, discombobulating them for up to a couple of days).